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No. 71-517

In the Supreme Court of the United States

OCTOBER TERM, 1971

ELISHA COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

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After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted under an indictment charging him with having received, possessed and concealed twenty-six cases of taxpaid whiskey stolen from an interstate shipment, knowing them to have been stolen, in violation of 18 U.S.C. 659.[1] On October 1, 1970, he was sentenced to two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. A).

[1] Petitioner's father, a co-defendant, was convicted but did not appeal; petitioner's brother was acquitted on a related charge.

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The government's evidence at trial showed that on July 28, 1969, petitioner telephoned one Janet Ballard and asked whether she knew of anyone who wanted to buy some whiskey. Mrs. Ballard said she did; later that day, petitioner delivered approximately forty cases of whiskey to the home of Mrs. Ballard in Newport, Kentucky (Tr. 2–5).

On the following evening, Mrs. Ballard telephoned petitioner and told him to remove the whiskey since she had heard that it was stolen (Tr. 7).[2] Petitioner and James Martin, Mrs. Ballard's brother, then moved the whiskey to the home of petitioner's estranged wife where an additional thirty or forty cases of whiskey were already stored (Tr. 38–40). Later in the same week, Martin received a call from petitioner; he was told that "the heat was on" and that the whiskey would again have to be moved (Tr. 40, 60–63). Martin and petitioner then transported the whiskey to Hazard, Kentucky, where it was stored in an old shed on the property of petitioner's father (Tr. 40–43).

Thereafter, Martin went to the F.B.I. agent assigned to the area and told him of the stolen whiskey (Tr. 45, 51, 112). The agent gave the information to the Kentucky state police; they obtained and executed a warrant to search the father's farm and, pursuant

[2] In the interim, Mrs. Ballard had sold ten cases and had given petitioner the money (Tr. 5, 7).

thereto, seized the twenty-six cases of stolen whiskey involved here (Tr. 100–105). Petitioner, who was not present at the time of the seizure, was later arrested at his home in Newport (Tr. 119–120).

At trial petitioner disclaimed any interest in or knowledge of the whiskey (Tr. 172–173). Defense witnesses, all of whom were members of petitioner's family, testified that the whiskey had been placed in the shed by Martin and one Chapman, who were alleged to have rented the shed from petitioner's mother (Tr. 130, 198, 215, 224).[4]

Prior to trial, petitioner and his co-defendant made a motion to suppress the whiskey on the ground that the search warrant was not supported by probable cause. After an evidentiary hearing, which did not focus on the question of standing, the district judge denied the motion, finding that the affidavit for the search warrant was sufficient. On appeal, the government did not rely on the sufficiency of the affidavit, but asserted for the first time that petitioner had no standing to raise a Fourth Amendment claim since he was not on the property at the time of the search and asserted no interest in the seized whiskey. The court of appeals held that petitioner was without standing.

1. The affidavit for the search warrant was clearly insufficient. It states in pertinent part that the affiant has "reasonable grounds from information from an informant that this whiskey was transported to the

[4] Martin denied having transported the whiskey with Chapman or having rented the shed (Tr. 68–69).

above described premises." This Court has held that such conclusory allegations do not provide the magistrate or judge with enough facts from which to assess the credibility of the matters asserted. *Aguilar* v. *Texas*, 378 U.S. 108.

2. With respect to standing, the question is close and difficult. As far as we can perceive, it is not covered by any prior decision of the Court.

Petitioner argues that *Jones* v. *United States*, 362 U.S. 257, is controlling. There, however, the defendant, who objected to a seizure of narcotics, was on the premises at the time of the unlawful search; he claimed to be a guest of the person who owned the apartment. Here, by contrast, petitioner has shown no interest in the shed where the whiskey was found. It was owned by petitioner's father (Tr. 40–43), and was said to be leased to two men unrelated to petitioner (Tr. 198, 215, 224). Petitioner was not present on the premises at the time of the search, or near the premises at the time the search warrant was executed. Consequently, he is now in no position to claim an interest in the premises sufficient to give him standing to suppress evidence even under the broadest reading of the holding in *Jones*. See, *e.g.*, *Parr* v. *United States*, 255 F. 2d 86 (C.A. 5); and cf. *Stassi* v. *United States*, 410 F. 2d 946 (C.A. 5). He did not claim to be in possession or to be the owner of the whiskey.

Nor is the other aspect of the *Jones* decision, turning on the nature of the crime charged in the indictment, necessarily determinative in this case. In *Jones*, the defendant was charged with unlawful possession

of narcotics; proof of "possession" of the contraband at the time of the search was alone sufficient for conviction. In these circumstances, the Court concluded that, where "possession both convicts and confers standing," the government cannot challenge a Fourth Amendment claim on the ground that the accused had no possessory interest in the premises searched or the property seized (362 U.S. 263). But, this holding has been read narrowly to apply only where proof of possession is alone enough to convict. See *United States* v. *Konigsberg,* 336 F. 2d 844 (C.A. 3). Thus, in *Konigsberg,* the Third Circuit held that *Jones* had no application where "[p]ossession is only one element of the crime charged" (336 F. 2d at 847). That, of course, is precisely the situation here; the theft, interstate commerce, and knowledge of the theft are all matters of proof by the government without which the charge would fall as a matter of law. But see *United States* v. *Price,* 447 F. 2d 23 (C.A. 2); *United States* v. *Cobb,* 432 F. 2d 716, 721 (C.A. 4); *United States* v. *Allsenberrie,* 424 F. 2d 1209, 1213 (C.A. 7); *Colosimo* v. *Perini,* 415 F. 2d 804 (C.A. 6); *Niro* v. *United States,* 388 F. 2d 535, 537 (C.A. 1).

Similarly, this Court's decision in *Simmons* v. *United States,* 390 U.S. 377, is inapplicable. There, the defendant testified at a suppression hearing that he owned the property, in order to establish his standing. The Court refused to suppress the evidence. Thereafter, at the trial on the merits, the defendant's testimony at the suppression hearing was offered and received in evidence, as an admission. This Court held that this was error because it, in effect, forced the

defendant "either to give up what he believed with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Simmons* v. *United States,* 390 U.S. at 394.

Here, we have no such tension between the Fourth and the Fifth Amendments. No prior testimony of the defendant was offered at the trial, so that the *Simmons* case itself is not applicable. Moreover, the position of the defendant throughout was that he did not own the property. He was put under no special risk of perjury, and he did not waive any Fifth Amendment rights. Under *Simmons,* he was free to testify at the suppression hearing that he did own the property, and this testimony could not be used against him at the trial. However, in fact, he made no claim of ownership at the suppression hearing.

It may be that, under these circumstances, the fact alone that the whiskey was found on the premises did not establish that the defendant was then in "possession" of it. However, there was here plenty of other evidence of possession either on these premises, or elsewhere. The evidence provided by the whiskey, though perhaps not sufficient to prove possession by the defendant at the moment of seizure, did fit in with other evidence to show quite clearly that the defendant had been in possession of the whiskey at various times and places, for example, in the process of

transporting it to Hazard, Kentucky, and storing it in petitioner's father's shed.

As we have indicated, the question seems to us to be a close one. However, neither *Jones* nor *Simmons* seems to require a different result than that reached by the court below and there is thus no reason at this time why the decision of the court of appeals should not be allowed to stand.

It is therefore respectfully submitted that a petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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